Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

BRIEF FOR APPELLANT

JOEL W. WESTBROOK
MATT C. C. BRISTOL, III
1910 National Bank of Commerce Building
San Antonio, Texas 78205
(512) 226-6293

PHILIP E. McCLEERY
1200 American Amicable Building
Waco, Texas 76701
(817) 756-7231
Attorneys for Appellant

Of Counsel:
TRUEHEART, McMILLAN, WESTBROOK, HOFFMAN & RUSSELL
SHEEHY, LOVELACE & MAYFIELD

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	11
The Texas venue statute impermissibly denies foreign corporations authorized to do business in the state the equal protection of the laws by establishing broader venue and different procedural and substantive treatment from that afforded domestic corporations	11
A. The Texas venue statutes discriminates between foreign corporations authorized to do businss in the state and domestic corporations	18
B. No rational explanation justifies the disparate venue treatment afforded foreign corporations authorized to do business in Texas vis-a-vis the treatment afforded domestic corporations	18
C. That portion of the Texas venue statute which allows a foreign corporation authorized to do business in the state to be sued in any county where it has an agency or representative is repugnant to the equal protection clause of the Fourteenth Amendment inasmuch as no such venue is allowed in suits against domestic corporations and because there is no rational basis for this distinction	28
CONCLUSION	32

INDEX OF AUTHORITIES

Cases

	PAGE
Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499 (1931)	25

Bohn v. Better Biscuits, Inc., 26 Cal. App. 2d 61, 78 P. 2d 1137 (1938) 30
Brown v. Clary, 315 S.W. 2d 385 (Tex. Civ. App. 1958) . . 14
Cincinnati St. Ry. v. Snell, 193 U.S. 30 (1904) 29
Commercial Ins. Co. v. Adams, 369 S.W. 2d 927 (Tex. 1963) 6, 10, 13, 20
Continental Oil Co. v. P. P. G. Industries, 504 S.W. 2d 616 (Tex. Civ. App. 1973) 13
Employers Casualty Co. v. Clark, 491 S.W. 2d 661 (Tex. 1973) 6, 17
Exxon Corporation v. Jay M. Preston, No. 73-232, 414 U.S. 1038 (1974) 6, 21
Fireman's Fund Ins. Co. v. McDaniel, 327 S.W. 2d 358 (Tex. Civ. App. 1959) 11, 19
Fisher Packing Co. v. Mattox, 90 S.W. 2d 70 (Ky. 1936) . . 30
Grayburg Oil Co. v. Powell, 15 S.W. 2d 542 (Tex. Comm. App. 1929) 19
Groce v. Gulf Oil Corp., 439 S.W. 2d 718 (Tex. Civ. App. 1969) 6
Hanover Ins. Co. v. Sanford, 457 S.W. 2d 115 (Tex. Civ. App. 1970) 17
Home Indemnity Co. of New York, N.Y. v. Hicks, 488 S.W. 2d 614 (Tex. Civ. App. 1972) 21
J. I. Case Co. v. Darcy, 424 S.W. 2d 501 (Tex. Civ. App. 1968) 31
Maryland Cas. Co. v. Torrez, 359 S.W. 2d 559 (Tex. Civ. App. 1962) 20
McClung v. Pulitzer Publishing Co., 214 S.W. 193 (1919) . 29
Merryman v. Zeleny, 143 S.W. 2d 410 (Tex. Civ. App. 1940) 15
Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580 (1935) 24
Meyer v. Anselm & Co., Inc., 196 Misc. 736, 94 NYS 2d 613 31
Milligan v. Southern Express, Inc., 250 S.W. 2d 194 (Tex. 1952) 21
National Life Co. v. Rice, 167 S.W. 2d 1021 (Tex. Comm. App. 1943) 14
O. M. Franklin Serum Co. v. C. A. Hoover & Son, 410 S.W. 2d 272 (Tex. Civ. App. 1966) 31
Phillips Petroleum Co. v. Smith, 61 P. 2d 184 (Okla. 1936) . 30

Pittsburg Water Heater Co. of Texas v. Sullivan, 282 S.W. 576 (Tex. Comm. App. 1926) 5, 12
Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927) 8, 10, 12, 20, 28, 29, 30, 32
State v. State Mutual Life Assur. Co., 353 S.W. 2d 412 (Tex. 1962) 13, 22
Victoria Bank & Trust Co. v. Monteith, 158 S.W. 2d 63 (Tex. Comm. App. 1941) 6
Ward v. Fairway Operating Co., 364 S.W. 2d 194 (Tex. 1963) 26
Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) . . . 13
Windham v. Pace, 6 S.E. 2d 270 (S.C. 1939) 30

UNITED STATES CONSTITUTION

Equal Protection Clause, 14th Amendment 1, 2, 10, 14, 26

STATUTES AND RULES

Title 28 U.S.C. Sect. 1257 (2) 2
Tex. R. Civ. P. 86 5
Tex. R. Civ. P. 87 15
Tex. R. Civ. P. 483 13
Tex. Rev. Civ. Stat. Ann. art. 1995 . . . . 2, 4, 8, 9, 12, 14, 15, 34
Acts of 19th Leg., 1885 (G.L. Vol. 9, p. 699) 19
Tex. Insurance Code, art. 1.04(b) 22
Tex. Insurance Code, art. 21.43 22
Tex. Bus. Corp. Act, art. 2.09 23
Tex. Bus. Corp. Act, art. 3.02 23
Tex. Bus. Corp. Act, art. 8.02A 12, 13
Tex. Bus. Corp. Act, art. 8.05 23
Tex. Bus. Corp. Act, art. 8.08 23
Tex. Bus. Corp. Act, art. 9.14 23
Tex. Rev. Civ. Stat., art. 2031b 27

MISCELLANEOUS AUTHORITIES

Ninety-ninth Annual Report of the State Board of Insurance 7, 22
Langley, *A Suggested Revision of the Texas Venue Statute*, 30 Tex. L.R. 547 (1952) 15, 20
Oxford English Dictionary, 1971 Ed. 18
The Constitution Problem of Providing Venue Classification for Foreign Corporations in Texas, 18 S.W. L.J. 291 (1964) 27, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

BRIEF FOR APPELLANT

Appellant appeals from the judgment of the Court of Civil Appeals of Texas, Tenth Supreme Judicial District, entered on October 17, 1974, affirming the judgment of the 74th Judicial District Court of McLennan County, Texas, overruling appellant's plea of privilege to be sued in the county of its residence and principal office, Dallas County, Texas, and holding that the Texas statute upon which this decision was based is not repugnant to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas for the Tenth Supreme Judicial District is reported at 515 S.W. 2d 354, and was reproduced, together with other motions, orders and notices pertinent to this appeal, as Appendix A to Appellant's Jurisdictional Statement filed previously in this Court.

JURISDICTION

The judgment of the Texas Court of Civil Appeals from which this appeal is taken was entered on October 17, 1974. A timely motion for rehearing was filed on October 31, 1974, and overruled on November 21, 1974. Appellant filed a timely application for writ of error with the Supreme Court of Texas on January 2, 1975, and this application was dismissed for want of jurisdiction on February 26, 1975, without an opinion. Notice of appeal to the Supreme Court of the United States was filed in the Texas Court of Civil Appeals for the Tenth Supreme Judicial District on March 18, 1975. The jurisdiction of the Supreme Court of the United States to review the decision of the Texas Court of Civil Appeals is conferred by Title 28, U.S.C. Section 1257(2). This appeal was docketed on May 27, 1975, and probable jurisdiction was noted by this Court on October 6, 1975.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The provision of the United States Constitution here involved is the Equal Protection Clause of the Fourteenth Amendment.

The statute here involved is the general venue statute of the State of Texas, Tex. Rev. Civ. Stat. Ann. Art. 1995 (1950), which provides in pertinent part:

"No person who is an inhabitant of this State shall be

sued out of the county in which he has his domicile except in the following cases:

* * * *

"3. Non-residents; residence unknown.—If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

* * * *

"23. Corporations and associations.—Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; *or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative.* Suits against a railway corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

* * * *

"27. Foreign Corporations.—*Foreign* corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, *or in any county*

where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them reside." (emphasis added)

Subdivision 27, which provides an alternative county for venue of suits against foreign corporations only, is the portion of the statute being challenged.

QUESTION PRESENTED

Whether that portion of subdivision 27 of Article 1995 which allows a foreign corporation, authorized to do business in Texas, to be sued in *any* county where it has an agency or representative, without regard to where the plaintiff resided at the time his cause of action arose, is repugnant to the Equal Protection Clause of the Fourteenth Amendment, inasmuch as there is no rational basis for Texas' distinction for venue purposes between a foreign corporation authorized to do business in Texas and a domestic corporation, which, regardless of where it has an agency or representative, may only be sued in a county away from that of its domicile or principal office upon proof under subdivision 23 that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellee, Virgil B. Starnes, a resident of McLennan County, Texas, filed suit in McLennan County against appellant, American Motorists Insurance Company, under the uninsured motorist provisions of a liability insurance policy

issued to appellee by appellant. The automobile collision out of which this cause of action and appellee's damages arose occurred in Fort Worth, Tarrant County, Texas. Appellant is an Illinois corporation which conducts its Texas business operations under a certificate of authority issued by the Texas State Board of Insurance, and which maintains its principal Texas offices in Dallas County, Texas. Process was served, in accordance with the Texas Insurance Code, upon appellant's statutorily designated process agent, the Commissioner of Insurance, at Austin, Travis County, Texas. Appellant filed a plea of privilege[1] to be sued in the county of its residence[2], Dallas County. Appellee filed a controverting plea,[3] asserting venue in McLennan County under both subdivisions 23 and 27, but at the hearing upon the plea of privilege relied exclusively upon subdivision 27[4] and a stipulated showing that appellant was a foreign corporation transacting business in Texas with a local agent in McLennan County. Appellee was not required, nor did he attempt, to offer evidence as to any of the constituent elements of his cause of action during the course of the plea of privilege hearing, and the trial court overruled appellant's plea of privilege. Appellant argued before the Court of Civil Appeals

---

[1] A plea of privilege is a verified pleading by which, under Texas practice, a defendant challenges the venue of a suit. Tex. R. Civ. P. 86.

[2] The words "domicile" and "inhabitant" have, for purposes of, Article 1995, been interpreted to mean "residence" and "resident," *Pittsburg Water Heater Co. of Texas v. Sullivan*, 282 S.W. 576 (Tex. Comm. App. 1926).

[3] A controverting plea is a verified pleading by which, under Texas practice, the plaintiff states specifically the grounds relied upon to confer venue in the county of suit under one or more of the subdivisions of Article 1995. Tex. R. Civ. P. 86.

[4] Plaintiff's residence in the county wherein he filed this suit is not material to the establishment of venue in such county under subdivision 27, unless the defendant corporation has no agency or representative at any location within the State of Texas.

of Texas, Tenth Supreme Judicial District, that subdivision 27 is unconstitutionally discriminatory, because it permits a foreign corporation, which has affirmatively submitted itself to state controls by acquisition of a certificate of authority, to be venue bound without plaintiff's having to prove a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent, as compared with the requirement of subdivision 23, as construed by the Texas courts,[5] that a Texas domestic corporation can be venue bound only upon proof by the plaintiff of each and every element of his cause of action by a preponderance of the evidence. The Court of Civil Appeals, relying primarily upon what it deemed to be a prior authoritative holding of the Texas Supreme Court,[6] and declining an invitation to re-examine the question in the light of the then recent order of the Supreme Court of the United States noting probable jurisdiction in *Exxon Corporation v. Jay M. Preston*, No. 73-232, 414 U.S. 1038,[7] affirmed the judgment of the trial court. Appellant then applied to the Texas Supreme Court

[5] Subdivision 23 requires that the plaintiff prove all the elements of his cause of action when he seeks thereunder to sue a domestic corporation away from its principal office. The standard of proof is the same standard which prevails during trial on the merits, i.e., preponderance of the evidence. *Victoria Bank & Trust Co. v. Monteith*, 158 S.W. 2d 63, 66 (Tex. Comm. App. 1941); *Groce v. Gulf Oil Corp.*, 439 S.W. 2d 718, 720 (Tex. Civ. App. 1969). In an uninsured motorist case, plaintiff must offer proof establishing both the making of the insurance contract and its breach, i.e., that the other vehicle was an "uninsured automobile" within the meaning of the policy, *Employers Casualty Co. v. Clark*, 491 S.W. 2d 661 (Tex. 1973), that the uninsured motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries.

[6] *Commercial Ins. Co. v. Adams*, 369 S.W. 2d 927 (Tex. 1963), refusing writ of error, 366 S.W. 2d 801 (Tex. Civ. App. 1963). Both the opinion of the Texas Court of Civil Appeals and the Texas Supreme Court's per curiam decision were reproduced and included within Appellant's Jurisdictional Statement at Appendix C thereto.

for a writ of error, but that court dismissed the application for want of jurisdiction, thus presenting this Court with a viable, ripe, and extremely important constitutional issue that has not only created much conflict among the appellate courts of Texas, but has adversely affected, and continues to adversely affect, not only this Appellant, but also many of the nation's largest corporations which transact business daily in Texas, under much the same degree of State supervision and control as Texas domestic corporations, but which are, for one reason or another, incorporated under the laws of another state.[8]

SUMMARY OF ARGUMENT

While a state may impose conditions upon the entry of any foreign corporation to do business within its borders, once it has permitted them to enter, the adopted (or domesticated) corporations are entitled to equal protection with the state's own corporate progeny. The surrender of constitutional rights cannot be the price of admission.

The fly in the ointment of the Texas venue statute is that it fails to include those domesticated foreign corporations, i.e., those which have secured a certificate of authority to do business in Texas, and thereby submitted to virtually the same controls which apply to their domestic counterparts,

[7] Remanded by this Court, on February 19, 1974, to the Texas Court of Civil Appeals, Ninth Supreme Judicial District, for consideration of a question of mootness. The opinion of that Texas court, holding that the issue had indeed become moot, is reproduced at Appendix B of Appellant's Jurisdictional Statement. The instant appeal effects the legal resurrection of this vitally important and substantial federal constitutional issue.

[8] Appendix C to the very comprehensive jurisdictional statement filed in this Court in the *Exxon* case contained information to the effect that of the fifty largest corporations *headquartered* in Texas during 1972, only nine were domestic corporations. Moreover, as of August 31, 1974, only 725 of a total of 1,705 corporations holding certificates of authority to conduct the business of insurance in Texas were domestic corporations. *Ninety-Ninth Annual Report of the State Board of Insurance, at page 1.*

within the same classification category as Texas domestic corporations. In short, the Texas statute, by lumping *all* foreign corporations together, fails to discriminate where it should and discriminates where it shouldn't.

The decision of the courts below, upholding the constitutionality of subdivision 27 of Article 1995 over Appellant's claim that it denies foreign corporations authorized to do business in Texas the equal protection of the laws, is in direct conflict with this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), hereinafter referred to as *Saunders*. The sole issue presented in this appeal is whether a foreign corporation authorized to do business in a state may, for venue purposes, consistent with the Equal Protection Clause, be treated differently from a domestic corporation. *Saunders* holds that it may not.

In *Saunders*, this Court was confronted with an Arkansas venue statute which allowed foreign corporations, regardless of whether they were authorized to transact business in Arkansas, to be sued in any county of the State on a transitory cause of action, while domestic corporations could be sued only in counties in which they were doing business or were maintaining an office, officer, or agent. Referring to foreign corporations authorized to do business in a state and having a fixed place of business and an authorized agent on whom process may be served, this Court held that "so far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals." 274 U.S. at 494.

The *Saunders* decision clearly governs the Texas statute. While the statutory scheme in Texas differs in several respects from the Arkansas statutes upon which this Court passed judgment in *Saunders*, these differences are not material to the instant appeal. It is the fact of different treatment, rather than the nature or extent of the difference, which offends the equal protection clause. The Texas statute,

article 1995, establishes broader venue, and different procedural and substantive treatment, for all foreign corporations, whether or not authorized to do business in Texas, than is provided for Texas domestic corporations.

Under subdivision 27 of article 1995, *any* foreign corporation, be it a domesticated corporation whose offices span four city blocks of downtown Dallas, or an officious interloper who pops in for a deal and then withdraws to its apparent sanctuary outside the State, can be sued in any of Texas' 254 counties in which it may have an agency or representative. Under subdivision 23, however, suits against domestic corporations may be brought outside the county where the cause of action arose or the county in which the company's principal office is located *only* by proof that the company has an agency or representative therein *and* that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

Because subdivision 27 does not require the showing that must be made under subdivision 23, foreign corporations are deprived of a very valuable, practical opportunity to obtain a measure of discovery, at the venue hearing, as to the nature of plaintiff's cause of action and to crossexamine either the plaintiff or such witnesses as are called to establish his case. If one chooses to sue a domestic corporation in a county removed from where the cause of action arose or where the corporation has its principal offices, he must be prepared to put on a case that would at least survive a motion for instructed verdict or else the law suit will stall then and there, before it really gets started, and be transferred to the defendant corporation's home county. But the foreign corporation receives no such protection. The instant case presents a vivid example of how little a plaintiff is required to establish in order to defeat the basic venue right of a foreign corpora-

tion to be sued in the county of its domicile. It becomes readily apparent that venue, *Texas style*, involves procedural and substantive considerations and protections over and above the matter of the ultimate geographical situs of a lawsuit.

The only justifications ever advanced by the appellate courts of Texas for treating authorized foreign corporations differently, for venue purposes, from their domestic counterparts are set forth in the *Adams* case (reproduced as Appendix C to Appellant's Jurisdictional Statement). These justifications, individually and collectively, fail to sustain the classification because they either concern matters not pertinent to venue, such as service of process and collection of judgments, or they simply fail to recognize or appreciate the very comprehensive controls which Texas State agencies (in the case of this appellant, the State Board of Insurance) exercise over those foreign corporations who voluntarily submit to these controls in conjunction with their acquisition and retention of certificates of authority. In essence, the Texas venue statute represents an arbitrary and unconstitutional classification of authorized foreign corporations from domestic corporations.

A judicial suggestion to the legislature to correct this obvious inequity has apparently fallen upon deaf ears, and the Texas courts have declined an invitation to construe subdivision 27 as applying only to *unauthorized* foreign corporations. With its back thus braced against the wall, the Equal Protection Clause has no way to go other than directly at the offending Texas statute. The near half century that has elapsed since *Saunders* has seen state controls over authorized foreign corporations expand to a point where the word *foreign* has lost its significance. Given the symmetry of State control over both domestic and authorized foreign corporations with respect to their Texas enterprises, *Saunders* would shudder at such arbitrary classification as Texas presently continues to enforce with respect to venue.

ARGUMENT

THE TEXAS VENUE STATUTE IMPERMISSIBLY DENIES FOREIGN CORPORATIONS AUTHORIZED TO DO BUSINESS IN THE STATE THE EQUAL PROTECTION OF THE LAWS BY ESTABLISHING BROADER VENUE AND DIFFERENT PROCEDURAL AND SUBSTANTIVE TREATMENT THAN THAT AFFORDED DOMESTIC CORPORATIONS.

A. The Texas Venue Statute Discriminates Between Foreign Corporations Authorized To Do Business In The State And Domestic Corporations.

That the Texas venue statute discriminates between domestic corporations and foreign corporations authorized to do business in the State cannot be denied. While a comparison of subdivisions 23 and 27 reveals some similarity of treatment, at least to the extent that *all* corporations may be sued (at the option of the plaintiff, of course) in either the county where their principal offices are located or in the county where the alleged cause of action arose, the dissimilarity predominates. *Any* foreign corporation *may* be sued in *any* county in which it has an agency or representative. Especially with insurance companies, such as this Appellant, which typically conduct a great deal of business through local agents whose offices are maintained in the various counties, this venue category could conceivably include every one of the 254 counties in Texas.

The legislative history of the Texas venue statute's treatment of domestic and foreign corporations is highlighted in *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W. 2d 358, 365-68 (Tex. Civ. App. 1959). Prior to 1943, it could be said

that the Texas venue laws afforded equal treatment to all corporations, be they domestic or foreign. Although the Legislature of Texas did, by its enactment in 1885 of what is now subdivision 27 of Article 1995, manifest an intention to place foreign corporations in a venue category separate and distinct from domestic corporations, virtually the same rules governed both categories. Just one year before *Saunders* was decided, the Texas Commission of Appeals, in an opinion subsequently adopted by the Texas Supreme Court,[9] observed:

> "Our courts make no distinction, so far as venue is concerned, between a domestic and foreign corporation. Nor do the statutes themselves make any such distinction. Exception 24 to Article 1830, referring to domestic corporations [a predecessor to the present subdivision 23, Article 1995], and exception 28 thereto [now subdivision 27, Article 1995] referring to foreign corporations, read exactly alike as to where such defendants are suable. Again, it has been the statutory law in Texas for years that when a foreign corporation obtains a permit to do business in this state, 'it shall have and enjoy all the rights and privileges conferred by the laws of this state on corporations organized under the laws of this state.' "[10]

282 S.W. at 579. Prior to 1943, *any* corporation could be sued in any county where it maintained an agency or representative. In 1943, however, the Texas Legislature amended the venue statute and enacted what is now subdivision 23. By deleting the provision allowing suit "in any county where

[9] *Pittsburg Water Heater Co. of Texas v. Sullivan.* See note 2, supra.

[10] The present statutory counterpart to the last quoted clause is Tex. Bus. Corp. Act, Art. 8.02A.

such [corporation] may have an agency or representative" from the subdivision applicable to domestic corporations, and introducing the requirement of proving a cause of action at a venue hearing against a domestic corporation if the suit is brought outside the county wherein the principal office is located, the Texas Legislature greatly narrowed the breadth of the venue exception for domestic corporations, and created the discriminatory classification to which this appeal is directed. The 1943 amendments did not alter the law governing venue of suits against foreign corporations.

Notwithstanding the mandate of what is now Tex. Bus. Corp. Act, Art. 8.02A, that those foreign corporations which have secured a Texas certificate of authority shall enjoy all the rights and privileges conferred by the laws of Texas upon domestic corporations, the Texas venue statutes have *never*, either before or after 1943, discriminated between authorized and unauthorized foreign corporations. Before the amendment *all* foreign corporations received substantially the same venue treatment as domestic corporations; thereafter, *all* foreign corporations, regardless of whether they had secured admission to Texas under a certificate of authority, were collectively relegated to the status of second class corporate citizens.

Just one year prior to the Texas Supreme Court's refusal of the application for writ of error in the *Adams* case,[11] the Texas Supreme Court, in *State v. State Mut. Life Assur. Co.*, 353 S.W. 2d 412 (Tex. 1962) cited both *Saunders* and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) for the prop-

[11] See note 6, supra. Refusal of the writ of error constitutes an unqualified approval by the Texas Supreme Court of not only the decision of the Court of Civil Appeals but also the legal theories or principles upon which the decision was based. In terms of precedential value, the decision of the Court of Civil Appeals in *Adams* is tantamount to a Supreme Court pronouncement. Tex. R. Civ. P. 483. *Continental Oil Co. v. P.P.G. Industries*, 504 S.W. 2d 616 (Tex. Civ. App. 1973).

osition that the right of a foreign corporation to do business within the State of Texas may not be conditioned upon compliance with regulations which are repugnant to the Constitution of the United States. It is interesting to observe the apparent irony of these circumstances, in that the combination of *Glander*, with its familiar admonition that where a state elects to admit foreign corporations to transact business "the adopted corporations are entitled to equal protection with the state's own corporate progeny," and *Saunders*, wherein this Court held that the Equal Protection Clause barred state discrimination between authorized foreign corporations, having a fixed place of business and an authorized process agent in the state, and their domestic corporate counterparts with respect to the venue of transitory actions, would seemingly seal the coffin of that portion of the Texas venue statute challenged in *Adams* and in the instant appeal.

It might be helpful at this point to provide a somewhat more expanded explanation of the procedural functioning of the Texas venue law. The Texas venue statute, Tex. Rev. Civ. Stat. Ann. Art. 1995, establishes a basic right to be sued in the county of one's domicile. The term "domicile" has been construed to be synonymous with "residence."[12] The term "venue" denotes the county in which a plaintiff has the legal right to institute and maintain his suit, notwithstanding the defendant's objections.[13] The venue statute is to be strictly construed favorably to the rights of defendants, and the burden is upon the plaintiff to plead and prove that his cause comes within one or more of the thirty-four enumerated exceptions [subdivisions] to the general rule.[14] In order to challenge the venue of a suit brought against him, a defendant files a verified "plea of privilege" to be sued in the

[12] See Note 2, supra.
[13] *National Life Co. v. Rice*, 167 S.W. 2d 1021 (Tex. Comm. App. 1943).
[14] *Brown v. Clary*, 315 S.W. 2d 385 (Tex. Civ. App. 1958).

county of his domicile. This pleading constitutes *prima facie* proof of the defendant's right to a change of venue. In order to join issue and prevent a summary transfer of the case, the plaintiff must then file a "controverting affidavit" which must specifically state the grounds relied upon to confer venue under one[15] of the subdivisions of Article 1995. One Texas jurist has observed that more venue cases reach the appellate courts in Texas than in all the other states combined,[16] a logical byproduct of the numerous and overlapping exceptions to the Texas venue statute.[17] When the issue has been joined by the timely filing of a controverting affidavit, a plea of privilege hearing is held, normally prior to trial on the merits. At this hearing the plaintiff bears the burden of proving the requisite venue facts by a preponderance of the evidence. Either party is entitled to demand that a jury determine the venue facts,[18] but if the defendant demands a jury, the trial court has discretion to require that the entire cause be tried on its merits at the same time.[19]

[15] It is not an infrequent occurrence that a plaintiff will set forth, in his controverting plea, facts which would sustain venue in the county of suit under several of the different subdivisions of Art. 1995.

[16] Langley, *A Suggested Revision of the Texas Venue Statute*, 30 Texas Law Review 547, 548 n. 4 (1952). This same article recognizes that subdivision 27 would, under the *Saunders* decision, contravene the Equal Protection Clause, see p. 563, and suggested that no distinction should be made between foreign and domestic corporations in so far as venue is concerned.

[17] Appendix "A" to this Brief sets forth the entire text of the Texas Venue Statute, Tex. Rev. Civ. Stat. Ann. Art. 1995, in its present form.

[18] *Merryman v. Zeleny*, 143 S.W. 2d 410 (Tex. Civ. App. 1940).
[19] Tex. R. Civ. P. 87.

The venue facts which plaintiff must prove at the plea of privilege hearing vary according to which subdivision[20] he chooses to rely upon in order to keep the lawsuit in the county wherein he filed it. Where, as in the instant case, a plaintiff seeks to sustain venue against a foreign corporation under subdivision 27's "or in any county where such company may have an agency or representative" provision, all that need be established is that the defendant has an "agency or representative" in that county. This merely requires proof that the defendant does business in the county "in a more or less regular and permanent form" or that some person in the county can exercise powers on behalf of the company.[21] Under subdivision 23, a plaintiff who seeks to sue a domestic corporation away from the county of its principal office must prove each and every element of his cause of action, by a preponderance of the evidence; in short, it is necessary to prove by a preponderance of the evidence that a cause of action exists against a domestic corporation, even though it may have any number of agencies or representatives in the county of suit. Were this appellant, in the instant case, a Texas domestic corporation, the plaintiff would have been required to offer competent evidence to establish, by a preponderance of the evidence, both the execution and breach of the insurance contract pursuant to which his claim was brought. Since this is an uninsured motorists case, proof of the details of a vehicle collision in Fort Worth, Tarrant County, Texas, would have had to have been offered, in order to establish that the other vehicle was an "uninsured automobile" within the meaning of the policy, that the uninsured

[20] Even though several subdivisions of Art. 1995 may arguable apply to a given cause of action, and in fact be set forth in plaintiff's controverting affidavit, the tactics of Texas venue would dictate that plaintiff, at the plea of privilege hearing, rely upon the single subdivision to which the least onerous burden of proof attaches.

[21] *Milligan v. Southern Express, Inc.*, 250 S.W. 2d 194 (Tex. 1952).

motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries or damage.[22]

Appellant was thus afforded significantly different treatment, with consequences which a non-Texan would normally not associate with the question of venue, solely by reason of the locus of its corporate birthplace (or, more appropriately, its corporate citizenship). Because subdivision 27 does not require the showing[23] that must be made under subdivision 23, Appellant neither saw nor heard anything about the vehicle accident, out of which its adversary's claim arose, at the venue hearing. The entire emphasis was not upon the nature or sufficiency of the cause of action, but rather the presence of one of appellant's agents in the county of suit. Denied to appellant was a virtually unique opportunity afforded to domestic corporations, to preview its adversary's case in chief (except as to the extent of damages); to cross-examine plaintiff's witnesses as to the nature and existence of the alleged cause of action; to obtain from the Court a venue ruling which would, under the circumstances, be tantamount to a judicial assessment of plaintiff's cause of action; to nip a frivolous or baseless claim "in the bud," before it could escalate into a lengthy, complex and time-consuming lawsuit; and finally, to obtain, by demanding a jury trial of the

[22] *Employers Casualty Co. v. Clark*, see Note 5, supra.

[23] *Hanover Ins. Co. v. Sanford*, 457 S.W. 2d 115 (Tex. Civ. App. 1970), also an uninsured motorists claim against a foreign corporation insurer authorized to do business in Texas. While plaintiff's controverting plea cited subdivisions 3, 5, 9a, 23, 27, 28 and 29a of Art. 1995, as authority for sustaining venue in the county of suit, he relied exclusively upon subdivision 27 when before the Court of Civil Appeals. See Note 20, supra. Justice Quentin Keith, in a concurring opinion, observed: "... I point out this self-evident fact: The affirmance is required *solely* because Hanover is a foreign corporation. If it were a domestic corporation, the judgment below would be reversed. In my opinion, this is an obnoxious and discriminatory result, and one which should be called to the attention of the Legislature." 457 S.W. 2d at 119.

venue facts, either an early trial on the merits or at least a preliminary assessment by a jury of the plaintiff's credibility.

No one, including appellee, can deny that the Texas venue statute does discriminate in its substantive and procedural treatment of foreign corporations, regardless of whether they have become *domesticated* in connection with their acquisition of a Texas certificate of authority, vis-a-vis the treatment of domestic corporations. No one *has* denied it. Appellee's only recourse, in order to sustain the statutory classification herein assailed, is to do precisely what the Texas Court of Civil Appeals did in the *Adams* case, and either distinguish or discount *Saunders*, while at the same time beating the judicial underbrush to find one or more identifiable "rational justifications" in support of what is essentially an arbitrary classification in the context of the Equal Protection Clause.

B. No Rational Explanation Justifies the Disparate Venue Treatment Afforded Foreign Corporations Authorized To Do Business in Texas Vis-vis the Treatment Afforded Domestic Corporations.

Both the historical background of the statutory classification to which this appeal is directed, which has, to a certain extent, already been addressed in this Brief, and a realistic analysis of those characteristics of authorized foreign corporations and domestic corporations which have any pertinence to venue, lead one to the inescapable conclusion that the classification in question is utterly irrational and in fact *arbitrary*. The 1971 Edition of the Oxford English Dictionary[24] defines the term "arbitrary" as "Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying." *Arbitrary* may at first glance seem a bit too harsh a term for a member of the Bar of this Court to use in these circumstances. It is prob-

[24] Oxford University Press 1971. Library of Congress Catalogue Card Number: 76-188038.

ably one of the most powerful and enveloping words in the lawyer's verbal arsenal. And yet it must not be forgotten that it is the *classification* itself to which the term refers, and not those courts which have sustained it, nor the legislators who have up until now ignored an invitation to change it.

Prior to 1943 there was no discrimination as to venue between domestic and foreign corporations in Texas. As previously noted, there was *categorization* but no discrimination.[25] Why would the Texas Legislature in 1885 establish a separate category if the same venue rules were to be applied? The answer lies in the realization that the 1885 legislative enactment[26] dealt not only with venue of actions against foreign corporations, but also, and perhaps more importantly, with the matter of how to secure effective service of process upon such corporations. The 1943 amendments were not directed at subdivision 27 or specifically at foreign corporations. The discrimination was born of the legislature's conferring a benefit, i.e., a narrowing of the scope of the venue exception, upon domestic corporations without granting foreign corporations the same protection. One might well speculate that the discrimination was unintentional. Supportive of this theory is the fact that our Texas Supreme Court had, subsequent to the *Saunders* decision and prior to 1943, adopted several opinions of the Texas Commission of Appeals which stated that subdivision 23 was broad enough to apply to both domestic *and* foreign corporations.[27] This language appears to have been unnecessary to the decisions reached, thus *obiter dicta*, but certainly no comfort to authorized foreign corporations, such as appellant, involved in post-1943 litigation. Even if the present subdivision 23 were construed to apply to all corporations, whether domes-

[25] *Fireman's Fund Ins. Co. v. McDaniel*, supra, 327 S.W. 2d 365-66.
[26] Acts of 19th Leg., 1885 (G.L. Vol. 9, p. 699).
[27] *Grayburg Oil Co. v. Powell*, 15 S.W. 2d 542 (Tex. Comm. App. 1929) is but one of these decisions. The others are cited in *Fireman's Fund Ins. Co. v. McDaniel*, supra, at 327 S.W. 2d 366.

tic or foreign, the continued existence of the more specific subdivision 27 would render such a judicial construction of no benefit to appellant, for, as we have seen, a plaintiff need only establish the applicability of *one* of the various venue exceptions to his lawsuit, and the tactics of Texas venue practice lead plaintiffs to that exception which requires the least proof. Such is the nature of that portion of subdivision 27 herein assailed, a clause consisting of a mere thirteen words, but abounding with judicial and constitutional significance.

The notion that the present subdivision 27 might well be subject to an equal protection challenge under the *Saunders* ruling was included in a 1952 Texas Law Review Article, [28] but the point was not raised in the Texas appellate courts until the *McDaniel* case, [29] wherein the Court of Civil Appeals examined the historical basis for the Texas classification, and relying upon *Saunders*, held subdivision 27 to be unconstitutional. The *McDaniel* case was not appealed to the Texas Supreme Court, and the next case facing the issue also found that subdivision 27 denied foreign corporations the equal protection of the law. *Maryland Cas. Co. v. Torrez*, 359 S.W. 2d 559 (Tex. Civ. App. 1962). *Torrez* was appealed, but the Texas Supreme Court found that it did not have jurisdiction[29a] to decide the constitutional issue, 363 S.W. 2d 235 (Tex. 1962). The following year, the constitutionality of subdivision 27 was sustained in *Commercial Ins. Co v. Adams*, 366 S.W. 2d 801 (see note 6, supra.) which opinion

[28] See Note 16, supra.

[29] See Note 25, supra.

[29a] The appellate jurisdiction of The Texas Supreme Court is limited both by statute and by appellant's choice of which sections of the statute he will cite in his application for writ of error in order to sustain jurisdiction. In *Torrez*, the absence of a dissenting opinion in the Court of Civil Appeals, or a previous decision of either the Texas Supreme Court or another Court of Civil Appeals which was in conflict with the *Torrez* civil appeals decision, rendered jurisdiction lacking under the application there made.

was approved by the Texas Supreme Court. 369 S.W. 2d 927 (Tex. 1963). Since *Adams*, there have been a number of Texas appellate opinions, all in the Courts of Civil Appeals,[29b] which have, as is their duty, adhered to the decision of the Texas Supreme Court in *Adams*. In a relatively recent case, a Texas Court of Civil Appeals rejected what it termed an ingenious argument, on behalf of a foreign insurance company having a certificate of authority to do business in Texas, that subdivision 27 should be construed to apply only to *unauthorized* foreign corporations, with subdivision 23 encompassing both domestic corporations and authorized foreign corporations.[30] It was in this judicial context that the Court of Civil Appeals for the Tenth Supreme Judicial District considered and rejected this appellant's challenge to subdivision 27. 515 S.W. 2d 354. Exxon Corporation[31] did its best to carry this same constitutional issue to this Court

[29b] There are fourteen separate Courts of Civil Appeals within the State of Texas. Three different courts decided *McDaniel, Torrez* and *Adams*, respectively. *Hanover* (see Note 23, supra), *McDaniel, Hicks* (Note 30, infra) and *Exxon* were all decided by the Court of Civil Appeals for the Ninth Supreme Judicial District, at Beaumont, Texas.

[30] *Home Indemnity Company of New York, N.Y. v. Hicks*, 488 S.W. 2d 614 (Tex. Civ. App. 1972). The appellants argued that the 1943 amendment to subdivision 23 impliedly amended subdivision 27. The Court, however, found neither any ambiguity in subdivision 23 nor any manifestation of a legislative intention that foreign corporations were to be recipients of the benefits conferred by the 1943 amendment to subdivision 23. Being bound by the *Adams* decision on the constitutional issue, the Court observed that the wisdom of the provision was a matter for the Legislature.

[31] *Exxon Corporation v. Jay M. Preston*, No. 73-232, probable jurisdiction noted November 19, 1973, at 414 U.S. 1038. Remanded to the Texas Court of Civil Appeals February 19, 1974, for a determination of question of mootness. See Appendix B to Appellant's Jurisdictional Statement in the instant appeal.

for a decision, but after the noting of probable jurisdiction and submission by Exxon of its Brief,[32] the issue fell victim to what may, for want of a better term, be called "intentional mooting" at the hands of the appellee.

If the historical development of the Texas venue laws, as they relate to actions against domestic corporations and foreign corporations having a certificate of authority to do business in Texas, tends to raise red flags of irrationality, such predictions are borne out by an analysis of the realities of corporate life in Texas for both classes of corporations. The State of incorporation is the only difference between appellant and its counterparts who are Texas domestic corporations. All corporations which engage in the business of insurance in Texas, whether foreign or domestic, are licensed by, and subject to the rather comprehensive regulations of, the Texas State Board of Insurance. Foreign insurance companies constituted fifty-seven per cent of the total number of licensed insurers in Texas as of August 31, 1974.[33] Essentially the same certificate of authority must be secured by both foreign and domestic companies. Compliance with the numerous provisions of the Texas Insurance Code, including regulations promulgated by the State Board of Insurance,[34] is a condition precedent to the right of foreign insurance corporations to engage in the business of insurance in Texas,[35] and, as the Texas Supreme Court held in *State v. State Mutual Life Insurance Company of America*, 353 S.W. 2d 412 (Tex. 1962), a foreign insurer can have its

[32] The question presented herein is identical to, and framed in the same language as, the question in the *Exxon* appeal. Although differing in numerous substantive aspects, this Brief employs an argument that is organized in the same logical sequence as the Brief in *Exxon*.

[33] See Note 8, supra.

[34] Texas Insurance Code, Art. 1.04(b), vests original jurisdiction in the Board to determine policy, promulgate rules, and either promulgate or approve rates.

[35] Texas Insurance Code, Art. 21.43.

Texas certificate cancelled, at the instance of State authorities, if it conducts its Texas enterprises in violation of the Texas Insurance Code, even though the questioned activities are permitted by the laws of the state in which such foreign company was incorporated. Both domestic and foreign insurance corporations are required by law to designate an agent in the state upon whom civil process can be served. For most types of companies,[36] the Texas Commissioner of Insurance is either a mandatory or permissive designee for process agent.[37]

Although the *Texas Business Corporation Act* does not purport to govern certain specified types of corporations,[38] including corporations organized for the purpose of conducting the business of insurance, such being governed by special statutes (like the Texas Insurance Code), it should be pointed out that the same symmetry of control exists under Chapters 2 and 8, Tex. Bus. Corp. Act, with respect to *garden variety* domestic and foreign corporations. Virtually the same rules apply to both types of corporations with respect to designation of a registered office and registered agent for service of process.[39] To receive permission to do business in Texas, a foreign corporation must submit an application containing the same information required in a domestic corporation's application for a certificate of incorporation.[40] And once

[36] The Texas Insurance Code consists of a number of chapters which pertain specifically to certain kinds of insurance, such as casualty, life, health and accident, and title insurance.

[37] Appellant was served in the instant case through it's designated agent, the Texas Commissioner of Insurance.

[38] Tex. Bus. Corp. Act, Art. 9.14. Where the special licensing statute is silent as to a given area, or if it expressly provides that the general laws for incorporation shall supplement its provisions, then the provisions of the general law (Tex. Bus. Corp. Act) will apply to the extent they are not inconsistant with the special statute.

[39] Tex. Bus. Corp. Act, Arts. 2.09, 8.08.

[40] Tex. Bus. Corp. Act, Arts. 3.02, 8.05.

authorized to do business in Texas, a foreign corporation must advise the Secretary of State of Texas of any changes in its articles of incorporation, name, registered agent or office, or corporate purposes.

Under the Texas Insurance Code, not only does the State Board of Insurance exercise this same kind of control over foreign insurance companies, but it also regulates the manner in which their Texas business operations are conducted. Both domestic and foreign insurance companies in Texas are subject to the same regulations concerning advertising, the content of specific policies, and premiums rates. Comprehensive annual financial statements must be submitted by all licensed companies,[41] with foreign companies fully reporting all business activities, both within and without the State of Texas. Given the above similarities, there is no rational justification for treating *any* foreign corporation authorized to do business in Texas differently, for venue purposes, from its domestic counterpart. The ultimate test of the validity of subdivision 27 is not whether foreign corporations engaged in the insurance business (or doing any other lawful business) in Texas differ from their domestic counterparts, but whether the differences between them are pertinent to venue. *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580 (1935).

The only justifications ever advanced by the appellate courts of Texas for treating a foreign corporation authorized to do business in Texas differently, for venue purposes, from a domestic corporation, are set forth in the *Adams* case. A critical analysis of these justifications reveals that they fall

---

[41] The classification, or designation, made throughout this Brief as to *authorized* and *unauthorized* foreign corporations, while certainly applicable to foreign corporations in general, really does not apply to foreign insurance companies. Acquisition of a Texas certificate of authority is *mandatory* for all insurance companies who desire to engage in the business of insurance in the state.

considerably short of satisfying the *Brownell* standard. In descending order, these supposed justifications are:

(1) "It would be difficult, if not impossible, for a plaintiff to ascertain the principal office of a foreign corporation *not authorized* to do business in this state." (emphasis added) 366 S.W. 2d 808.

(2) "A foreign corporation qualified to do business in this state may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical." 366 S.W. 2d 808.

(3) "The difficulty of securing service on foreign corporations," as a factor justifying "a wide venue for actions against them." 366 S.W. 2d 808.

(4) ". . . the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations." 366 S.W. 2d 808-09.

(5) ". . . the machinery of government would not work if it were not allowed a little play in its joints." Quoting Mr. Justice Holmes in *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499 (1931).

(6) "It could well be that the legislature had in mind spreading litigation involving foreign corporations among the various courts of the state in order to avoid the possibility of increasing the congested condition of the dockets of the metropolitan courts." 366 S.W. 2d 809.

And finally . . .

(7) Other possibilities could be explored, but, as was pointed out by the Supreme Court of the United States in Metropolitan Casualty Insurance Company of New York v. Brownell, supra, "A statutory discrimination will not

be set aside . . . if any state of facts reasonably may be conceived to justify it.' " 366 S.W. 2d 809.

One must assume that the Texas Supreme Court, by its act of refusing the application for writ of error in *Adams*, agreed with the Court of Civil Appeals as to the legal merit of these justifications,[42] and further, that if the Texas Supreme Court were aware of any additional justifications, it did not deem them significant enough to warrant granting the writ and rendering a separate opinion on the matter.

This appeal does *not* present the issue of whether the State of Texas could, consistent with the Equal Protection Clause, classify foreign corporations *not* authorized to do business in Texas separately and under different venue ground rules from domestic corporations. As noted previously, Texas has never chosen to discriminate, for venue purposes, between authorized and unauthorized foreign corporations. They are as illogically intertwined in the statute (subdivision 27) as they are in the opinion of the Court of Civil Appeals in *Adams*. The first enumerated justification obviously does not apply to authorized foreign corporations. Moreover, it would be just as difficult to locate the principal office of a domestic or authorized foreign corporation, as the designated *registered* office need not be the same as the principal place of business.[43] The second justification also must fail. Neither a domestic nor an authorized foreign corporation can *designate* its principal office.[44] Its principal office is in fact the place where it conducts most of its Texas business. The reasoning of the Court of Civil Appeals would apply equally to a domestic corporation. There is no reason to believe that it would

[42] See Note 11, supra.

[43] Tex. Bus. Corp. Act, Arts. 2.09, 8.08.

[44] An authorized foreign corporation which has designated a registered office in a particular county has established its "residence" for purposes of its basic right under Art. 1995 to be sued in the county of its "domicile." The same is true of a domestic corporation. *Ward v. Fairway Operating Company*, 364 S.W. 2d 194 (Tex. 1963).

be less economical for a domestic than a foreign corporation to designate a registered office at a place far removed from its principal office. The Court in *Adams* writes of foreign corporations as if they had but one principal office, situated snuggly within the borders of the state of incorporation, while sending out multitudes of agents with suitcases in hand, ready to take advantage of the citizenry of neighboring states whenever the opportunity arises. This may have been some semblance of reality at some point far removed in our history, but one would assume that any authorized *foreign* corporation would have a principal *Texas* office that would be as easy to identify as that of a domestic corporation.[45]

The third justification might well draw the response that service of process and venue are neither legally equivalent nor do they have a common objective. The problem of locating and serving a foreign corporation is vastly different from the matter of proper venue of an action against the corporation. As to authorized foreign corporations, like their domestic counterparts, one serves the designated registered agent. As to those fleeting unauthorized foreign corporations, one may serve any agent he can find, or, if none be found, then employ substituted service upon the Secretary of State under the Texas Long-Arm Statute, Tex. Rev. Civ. Stat., Art. 2031b. But what has all this to do with venue? The fourth justification draws the same question. If the Court means that collection of a Texas judgment against a foreign corporation is more difficult, what has collection of judgments to do with venue? And who says that today's *foreign* corporations, most of which are from tiny Delaware, are any less likely to have assets in Texas from which a judgment could be satisfied than Texas domestic corporations? If the Court means that domestic insurance corporations,[46] or any other

[45] That the original rationale for the distinction between domestic and foreign corporations no longer comports with reality, is discussed in an excellent article at 18 S.W. L. J. 291, 302, *The Constitutional Problem of Providing Venue Classification for Foreign Corporations in Texas* (1964).

kinds of domestic corporations are subject to greater controls than authorized foreign corporations, it is in error.

No one would question the wisdom of state governmental machinery retaining "a little play in its joints," of being flexible enough to serve and protect its citizens, both individual and corporate. But Texas has misaligned the "joint," placing it between all foreign corporations and domestic corporations, when the realities of the present day would dictate placement between unauthorized foreign corporations and all others. And equalization of dockets, the heart of the sixth justification, should not, as pointed out by Exxon,[47] justify treating foreign corporations differently from domestic corporations for venue purposes any more than it would justify a statute allowing wider venue of suits filed against blacks than of suits filed against whites. Lastly, one wonders how many other possibilities could be *conceived*, and what they would have to do with either venue, or its objective – convenience of trial. It is respectfully submitted than none of the justifications upon which the *Adams* Court relied to sustain the admittedly discriminatory classification, either individually or collectively, can pass constitutional muster under the *Brownell* standard and in the context of a living Equal Protection Clause.

C. That Portion Of The Texas Venue Statute Which Allows A Foreign Corporation Authorized To Do Business In The State To Be Sued In Any County Where It Has An Agency Or Representative Is Repugnant To The Equal Protection Clause Of The Fourteenth Amendment Inasmuch As No Such Venue Is Allowed In Suits Against Domestic Corporations And Because There Is No Rational Basis For This Distinction.

The message of *Saunders* is not difficult to comprehend,

[46] *Adams*, and the great majority of appellate cases in Texas which have addressed the issue of equal protection and subdivision 27, involved foreign insurance companies.

[47] *Exxon* Brief, p. 23.

nor is it at odds with the realities of establishing venue for actions against authorized foreign corporations, having a fixed place of business in the state and a designated agent upon whom process may be served. State courts have been reluctant to strike down venue statutes, and *Saunders* has in some circles been distinguished to the point of emasculation.[48] Those courts which have *sidestepped Saunders* have received no small amount of encouragement from this Court's decision in *Cincinnati St. Ry. v. Snell*, 193 U.S. 30 (1904) with its oft-quoted language that:

> "It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."

193 U.S. 36. A *domestic* corporation in the *Snell* case claimed denial of equal protection of the laws because an *individual* plaintiff had the right to transfer an action to another county although the corporate defendant had no such right. The question of available original forums was not presented in *Snell*, only the right to transfer a case from a proper venue. Other than the geographical transfer to an adjoining county, no substantive or procedural differences were present. The Missouri Supreme Court[49] succinctly expressed the Snell decision as follows:

> "The opinion holds that classification made as to corporations having 50 stockholders or more was not unreasonable and that it was in the power of the Ohio Legislature to provide that a plaintiff in a suit against a corporation having 50 stockholders or more, which was pending *in the county where the corporation keeps its principal office or transacts its principal business*, may change the venue to some other county if he shall make an affidavit that he can not have a fair trial in the county

[48] See Note 45, supra. 18 S.W. L.J. 291, 294.

[49] *McClung v. Pulitzer Publishing Co.*, 214 S.W. 193 (1919).

were the suit is instituted . . ."
214 S.W. 198. The *Snell* decision involved no attempt to discriminate between authorized foreign corporations and domestic, but its broad language has since been applied to such classifications.[50] *Saunders* dealt with a broader geographical discrimination, and precisely with the classification groups present in the instant appeal. The Arkansas venue statute required actions brought against a domestic corporation to be initiated in a county where it had a place of business, or in which its chief officer resided, but it allowed suits against foreign corporations, regardless of whether authorized to do business and having a place of business in the state, to be brought in any county of the state. This Court noted that the geographical onus presented by the venue statute tended to increase materially the burden otherwise incident to presenting a defense. Just as significant was the observation that *Snell* was "cited as if venue provisions were there held to be beyond the reach of the equal protection clause. But this is a strained and inadmissible interpretation." 274 U.S. 495. And since the Texas venue statute herein assailed is without any foundation that is logically relative to venue, such a strained interpretation of *Snell* would be its only salvation.

Not all courts have seen fit to disregard *Saunders*. Those courts which relied upon it either declared the venue statute unconstitutional,[51] or construed it so as to apply to both domestic and foreign corporations.[52] It is also interesting to note that some discriminatory statutes have been upheld upon the theory that a foreign corporation authorized to do business in the state is a "nonresident" of that state for

[50] *Phillip's Petroleum Co. v. Smith*, 61 P. 2d 184 (Okla. 1936) is but one example. The *Adams* case may be another.

[51] *Fisher Packing Co. v. Mattox*, 90 S.W. 2d 70 (Ky. 1936); *Windham v. Pace*, 6 S.E. 2d 270 (S.C. 1939); and *McDaniel* are examples.

[52] *Bohn v. Better Biscuits, Inc.*, 26 Cal. App. 2d 61, 78 P. 2d 1137 (1938).

venue purposes.[53] The Texas cases in fact take the position, seemingly inconsistent with their reluctance to afford *domesticated* corporations equal protection under the venue laws, that authorized foreign corporations are considered residents of Texas for venue purposes.[54]

Saunders remains as the specific authority that the Texas venue classification here challenged violates the command of the Equal Protection Clause. The combination of inequalities, i.e., broader venue as well as the absence of any requirement of proof of a cause of action to sustain venue against an authorized foreign corporation, renders subdivision 27 unconstitutional. While the geographical differences of venue under subdivisions 23 and 27 as to domestic and foreign corporations authorized to do business in Texas, depending upon the facts of each case, may be smaller than under the statute condemned in *Saunders*, the substantive differences in terms of proof required in order to defeat the basic right of the "resident" corporation to be sued in the county of its domicile are greater than those involved in *Saunders*. In any event, it is the fact of the violation of the constitution which brings down the offending statute. The degree of the discrimination should have no effect. The Texas Court of Civil Appeals recognized this vital point in the *McDaniel* case.

> "Obviously, the discrimination occasioned by the 1943 amendment to Subd. 23 of our statute is not as great as that occasioned by the Arkansas statute. This, however, is not the criterion. The fact that a violation of the constitution is not a great one is no reason for permitting it. A mere opinion as to the degree of wrong which would arise if the constitution were violated does not afford a measure of the duty of enforcing its provisions."

327 S.W. 2d at 367-68.

[53] *Meyer v. Anselm & Co., Inc.*, 196 Misc. 736, 94 NYS 2d 613.

[54] *J. I. Case Co. v. Darcy*, 424 S.W. 2d 501 (Tex. Civ. App. 1968); and *O. M. Franklin Serum Co. v. C. A. Hoover & Son*, 410 S.W. 2d 272 (Tex. Civ. App. 1966).

CONCLUSION

The years that have followed the shadow of *Saunders* have seen the institution of such pervasive state controls over the activities of those foreign corporations which take affirmative action to become *domesticated* in a state that the Equal Protection Clause surely cannot stand by and ignore such a facially arbitrary classification as that presented by subdivision 27 of the Texas venue statute, Article 1995. It is a fitting time to reaffirm the *Saunders* decision, and extend to authorized foreign corporations that measure of the law to which they are entitled. They have paid their dues, and should be recognized for what they are. The term "foreign" is gradually losing its significance as an adjective descriptive of this nation's corporate entities. The application of subdivision 27 to authorized foreign corporations denies them the equal protection of the law. The various justifications conceived by the Texas Court of Civil Appeals in *Adams* are not worthy of so much as a second glance from the likes of *Brownell* and *Saunders*. The judgment of the court below should be reversed.

Respectfully submitted,

JOEL W. WESTBROOK
MATT C. C. BRISTOL, III
1910 National Bank of
Commerce Building
San Antonio, Texas 78205
(512) 226-6291
PHILIP E. McCLEERY
1200 American Amicable
Building
Waco, Texas 76701
(817) 756-7231
Attorneys for Appellant

Of Counsel:
TRUEHART, McMILLAN, WESTBROOK
HOFFMAN & RUSSELL
SHEEHY, LOVELACE & MAYFIELD

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1975, three copies of the foregoing Brief for Appellant were mailed, postage prepaid, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas, 76710, attorneys for Appellee. I further certify that all parties required to be served have been served.

Joel W. Westbrook

APPENDIX "A"

Art. 1995.

[1830] [1194]

[1198] **Venue, general rule**

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

1. Repealed Acts 1967, 60th Leg., p. 951, ch. 419 Sect. 1, eff. Aug. 28, 1967.

2. Transient persons.—A transient person may be sued in any county in which he may be found.

3. Non-residents; residence unknown.—If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides. The transfer or assignment of a note or chose in action shall not entitle any subsequent holder to sue thereon in any other county than that in which such suit could have been prosecuted if no assignment or transfer had been made.

5. Contract in writing.—(a) Subject to the provisions of Subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.

(b) In an action founded upon a contractual obligation of the defendant to pay money arising out of or based upon a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, suit by a creditor upon or by reason of

such obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract, or in the county in which the defendant resides at the time of the commencement of the action. No term or statement contained in an obligation described in this subsection shall constitute a waiver of this provision.

6. Executors, administrators, etc.—If the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, the suit may be brought in the county in which such estate is administered.

7. Fraud and defalcation.—In all cases of fraud, and in all cases of defalcation by public officers, suit may be brought in the county where the fraud was committed or where the defalcation occurred, or any of such suits may be brought where the defendant has his domicile.

8. Attachment, sequestration, etc.—A suit for damages resulting from the suing out of a writ of attachment or sequestration, or for levying any such writ, may be brought in the county from which such writ was issued, or in any county where such levy was made in whole or in part.

9. Crime or trespass.—A suit based upon a crime, offense, or trespass may be brought in the county where such crime, offense, or trespass was committed by the defendant, or by his agent or representative, or in the county where the defendant has his domicile. This subdivision shall not apply to any suit based upon negligence per se, negligence at common law or any form of negligence, active or passive.

9a. Negligence.—A suit based upon negligence per se, negligence at common law or any form of negligence, active or passive, may be brought in the county where the act or omission of negligence occurred or in the county where the defendant has his domicile. The venue facts necessary for plaintiff to establish by the preponderance of the evidence to

sustain venue in a county other than the county of defendant's residence are:

1. That an act or omission of negligence occurred in the county where suit was filed.

2. That such act or omission was that of the defendant, in person, or that of his servant, agent or representative acting within the scope of his employment.

3. That such negligence was a proximate cause of plaintiff's injuries.

10. Personal property.—Suit for the recovery of personal property may be brought in any county where the property may be or where the defendant resides.

11. Inheritances.—If the defendant has inherited an estate concerning which the suit is commenced, suit may be brought in the county where such estate principally lies.

12. Lien.—A suit for the foreclosure of a mortgage or other lien may be brought in the county where the property or any part thereof subject to such lien is situated.

13. Partition.—Suits for the partition of land or other property may be brought in the county where such land or other property, or a part thereof, may be, or in the county in which one or more of the defendants reside, or in the county of the residence of any defendant who may assert an adverse claim to or interest in such property, or seeks to recover the title to the same. Nothing heerin shall be construed to fix venue of a suit to recover the title to land.

14. Lands.—Suits for the recovery of lands or damages thereto, or to remove incumbrances upon the title to land, or to quiet the title to land, or to prevent or stay waste on lands, must be brought in the county in which the land, or a part thereof, may lie.

15. Breach of warranty.—Suits for breach of warranty of title to lands may be brought in any couny where either ven-

dor resides, and all other vendors may be joined in the same suit.

16. Divorce.—Suits for divorce shall be brought in the county in which the plaintiff shall have resided for six six months next preceding the bringing of the suit. However, the hearing may be held and judgment rendered in any other county within the same judicial district if (a) no answer has been filed, or (b) the parties agree to removal of the hearing to the other county.

17. Injunctions. Suits to enjoin the execution of a judgment or to stay proceedings in any suit shall be brought in the county in which such judgment was rendered or in which such suit is pending.

17a. Labor disputes.—Suits to enjoin strikes or picketing for an unlawful purpose or conducted in an unlawful manner shall be brought (1) in the county where the strike or picketing is alleged to have occurred; or (2) if service cannot be had on any of the defendants in the county described in clause (1), in the county of the residence of the defendant or any one of the defendants, if there be more than one; or (3) in Travis County when suit is brought by the State of Texas, and the state, its agencies or a political subdivision thereof is a party to the suit. Provided, however, that where suit is filed in a county authorized by the provisions of clauses (1) or (2) above, any party thereto may, within five (5) days after notice of institution of suit, make written application to the Presiding Judge of the Administrative Judicial District within which the suit is filed for the appointment of a substitute judge in the court where suit is filed, whereupon such Presiding Judge of such Administrative Judicial District immediately shall assign another District Judge from such Administrative Judicial District who shall thereafter hear all proceedings in such suit. The judge of the court in which such suit is filed shall have full power to act in the case until receipt by him of a copy of an order of the Administrative Judge removing the case or appointing a substitute judge, and the provisions of this Act shall be cumulative of existing rights of the parties to a change of venue as authorized by law. For the purpose of enabling all parties to procure the personal attendance of witnesses in any suit in a court of competent jurisdiction under the provisions hereof the clerk of said court where such suit is pending, if the suit is brought in or removed to a county other than the county where the strike or picketing is alleged to have occurred or the county of the residence of the defendant or any one of the defendants and on the application of any party to said suit, shall issue a subpoena for any witness or witnesses who may be represented to reside within any county in the State of Texas or found therein at the time of trial; and the provisions with respect to the issuance of subpoenas, penalties for failure of witnesses to appear, and the tendering of mileage and traveling expenses as provided in Article 7439a of Vernon's Revised Civil Statutes of Texas, 1925, shall apply.

18. Revision of probate.—Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had.

19. Suits against counties.—Suits against a county shall be brought within such county.

20. Heads of departments.—Suits for mandamus against the head of any department of the State Government shall be brought in Travis County.

21. Corporations: charters.—Suits brough by the State for the purpose of forfeiting the charter of a private corporation chartered by Act of the Legislature, or organized under the laws of this State, and for the purpose of canceling the permit authorizing a foreign corporation to transact business in this State, and for the purpose of restraining corporations from exercising powers not conferred upon them by

the laws of this State, and for the purpose of preventing persons from engaging in business in this State contrary to the laws thereof, may be brought in Travis County.

22. Railway lands.—Suits on behalf of the State to forfeit land fraudulently or colorably alienated by railway companies in fraud of the rights of the State, under the laws granting land to railway companies, shall be brought in Travis County.

23. Corporations and associations.—Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

24. Carriers.—Suits arising from damage or loss to any passenger, freight, baggage or other property, by reason of its transportation, or contract in relation thereto, in whole or in part by one or more common carriers or the assignees, lessees, trustees or receivers thereof, operating or doing business as such in this State, or having agents or representatives in this State, may be brought against one or more of those

so doing business, in any county where either does business or has an agent or representative.

25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

26. Railroad wages.—Suits by mechanics, laborers and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action, or part thereof, accrued, or in the county in which the principal office of such railroad company is situated.

27. Foreign corporations.—Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be

situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside.

28. Insurance.—Suits against fire, marine or inland insurance companies may also be commenced in any county in which the insured property was situated. Suits on policies may be brought against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policyholder or beneficiary instituting such suit resides.

28a. Fraternal benefit societies and statewide mutual assessment companies.—In all actions brought against Fraternal Benefit Societies and/or Statewide Mutual Assessment Companies, regardless of the plan upon which they operate and whether incorporated or not, growing out of or based upon any alleged right or claim or loss of proceeds due, arising from or predicated upon any policy or contract issued or made by such Fraternal Society and/or Statewide Mutual Assessment Companies, venue shall lie in the county where the policyholder or beneficiary instituting such suit resides or in the county of the principal office of such association or where such cause of action arose.

29. Libel or slander.—A suit for damages for libel or slander shall be brought, and can only be maintained, in the county in which the plaintiff resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

29a. Two or more defendants.—Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants,

then such suit may be maintained in such county against any and all necessary parties thereto.

30. Special venue.—Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

31. Breach of warranty by a manufacturer.—Suits for breach of warranty by a manufacturer of consumer goods may be brought in any county where the cause of action or a part thereof accrued, or in any county where such manufacturer may have an agency or representative, or in the county in which the principal office of such company may be situated, or in the county where the plaintiff or plaintiffs reside.